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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-547

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Petitioners,

v.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO—CLC, ANTHONY MAKRIS, as President of Said Local 1470 and WESTERN ELECTRIC COMPANY, INC., (KEARNEY WORKS),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding July 7, 1972.

Opinion Below

Th opinion of the Court of Appeals (—— F. 2d ——) appears in the Appendix hereto; as does the opinion of the United States District Court for the District of New Jersey (—— F. Supp. ——). Neither is yet reported.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on July 7, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(i).

Questions Presented

1. Whether, under *Vaca* v. *Sipes* (387 U. S. 171), it was sufficient to allege in the complaint herein violation by the respondent Union, in combination or conspiracy with respondent Employer, of its "statutory duty fairly to represent * * * [petitioning] employees * * * in its collective bargaining", considered as a process prior to, but resulting in, the labor contracts (which compounded that unfair representation) involved in this case?

2. Whether petitioners may use, as a basis for their complaint under Sec. 301 LMRA against the defendant Union and the defendant Employer, the *enforcement* of unfair contracts (*i.e.* labor contracts which on their face reveal unfair representation by the Union *in combination or conspiracy with the Employer* and which were the products of prior unfair representation by the Union, aided by the Employer, during the collective bargaining process)?

3. Whether the preliminary oral, written or implied agreements of recognition which preceded all collective bargaining by Union and Employer were necessarily *breached* by both parties, for the purposes of Sec. 301 LMRA, where the Union engaged in unfair representation of plaintiffs and their class, with the Employer's collaboration, during collective bargaining and in the resultant labor contract?

4. On the assumption that, under Sec. 301 LMRA, breach of contract is essential for a valid complaint (against Union and Employer) alleging unfair representation by the Union in combination or conspiracy with the Employer, did the complaint here sufficiently, if impliedly, allege such breach, since the explicitly alleged unfair representation by the Union in combination with the Employer necessarily implies breach by the contracting parties of their initial recognition agreement (whether written or oral) and their formal, written "Recognition" agreement reading: "Company recognizes the Union as the exclusive representative of the employees"?

5. On the assumption that an express allegation of breach of contract is essential for a complaint under Sec. 301 LMRA, should the Courts below have allowed petitioners to amend their complaint to enable them to allege, *as such breach,* violation by the Union with the Employer's collaboration, of the initial or preliminary recognition agreements and of the eventual formal "Recognition" clauses in the involved labor contrats?

Statutory Provision Involved

1. Section 301, Labor Management Relations Act, 1947, as amended (29 U.S.C. § 185):

TITLE III

Suits by and Against Labor Organizations

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

2. Section 9(a), LMRA:

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individ-

ual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

Statement of the Case

A. Preliminary Note

Petitioners appealed to the Third Circuit from a judgment of the United States District Court for the District of New Jersey dismissing their complaint and entering final judgment in favor of defendants pursuant to separate motions to dismiss the complaint made by defendants (1) Western Electric Company, Incorporated ("Western"), and (2) Local 1470, I.B.E.W., AFL-CIO-CLC (the "Union"), and Anthony Makris, president of the Union.

In the Court of Appeals, respondents sought affirmance of the judgment of the United States District Court basically on the grounds that (1) the court lacked jurisdiction over the subject matter of the complaint and (2) the complaint failed to state a claim upon which relief can be granted. They also took the position that petitioners should not be permitted to amend their complaint to allege breach of the recognition clauses involved; and that, in any event, such allegation would be of no avail to plaintiffs.

B. Statement of Facts

This is a class action brought by six individuals, members of the Union. Plaintiffs represent a class of employees of Western called "Testers-Inspectors". Said employees are in the collective bargaining unit represented by the Union. A copy of the involved complaint appears in the Appendix hereto.

In the first paragraph of the complaint it is alleged that the federal court has jurisdiction under Section 301 of the Labor Management Relations Act of 1947, as amended, (herein referred to as the "LMRA"), 29 U.S.C. §185.

The plaintiff Testers-Inspectors were consistently underpaid as compared with what other Testers-Inspectors were paid. This result is the effect of the establishment in December, 1964, of two groups of Testers-Inspectors:

1. "Day workers, i.e., those working on non-productive work and without incentives", and
2. "Supplementary or meantime workers to whom a supplement of 50¢ is also paid."

The complaint alleges that it was unfair discrimination by both Union and employer which established the two groups of Testers-Inspectors. The same dual grouping of Testers-Inspectors was included in four successive collective bargaining agreements between Western and the Union, namely those of 1964, 1966, 1968 and 1969. Plaintiffs' action was commenced May, 1970, after years of futile attempts to correct the situation by grievances presented to both employer and Union.

Nowhere is it expressly alleged in the complaint that Western violated any of the provisions of the various

collective bargaining agreements therein referred to. Indeed, precisely because the contracts were enforced *as written* plaintiffs below were damaged by the unfair representation during collective bargaining, *in which the employer* initially cooperated. It was that cooperation and unfair representation which produced the unfair contracts of which petitioners complain.

Relief is sought by way of damages for loss of wages, an order requiring the defendants to negotiate wage increases and an order enjoining defendants from further discrimination in the negotiation and application of labor agreements.

Reasons for Granting the Writ

1. In *Vaca* v. *Sipes*, 386 U. S. 171, this Court wrote:

> "It is now well established that as the exclusive bargaining representative of the employees • • • the Union had a statutory duty fairly to represent all those employees, both *in its collective bargaining with the* • • • [employer] • • • and in its enforcement of the *resulting collective bargaining agreement* • • •." (p. 177)
>
> "• • • fair representation duty suits often require review of the substantive positions taken and policies pursued by a union *in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery.*" (emphasis added; p. 181)

This quotation recognizes a duty in the union representative at *three successive stages* of its representation.

(i) The first stage is representation of the involved employees *during the process of bargaining.* Unfair representation can commence or take place entirely during this

first stage. Obviously, if it occurs only *during bargaining*, there cannot be a breach of resultant contract; since during collective bargaining, the eventual contract does not yet exist. The labor contract goes through a process of formulation, provision by the provision,—the first provision being "recognition". Bargaining ends when the *agreement of the bargaining parties* is signified either orally or in writing. But unfair representation could be continued, compounded and memorialized in the resulting labor contract and in its enforcement.

(ii) The second stage begins when, *after* bargaining, agreement (as the end result of bargaining) is reached. That very agreement could be the *locus* of unfair representation. But nothing in the nature of *unfair representation* confines it, temporally, to one or the other of the three stages.

(iii) The third stage, which in some respects is much like a continuation of collective bargaining, is the application or enforcement of the labor contract, usually entailing the handling of grievances.

Unfair representation by the union alone, or by the union in combination or conspiracy with the employer, can infect any of the three sequential stages. But *breach* of contract by definition requires as a condition precedent an *agreement: either* the preliminary recognition agreement *or* the final labor contract *or both*. A theory or rationale of unfair-representation causes is inevitably incomplete, unless it considers (i) all three stages, (ii) both the preliminary recognition agreement and the final labor contract, (iii) the meaning of "recognition" and of "representative", and (iv) the effect of employer collaboration with or implication in the unfair representation.

The cases to-day present an incomplete judicial rationale in these respects; they do not systematically consider and order the foregoing four factors.

Plaintiffs submit that this suit under Sec. 301 LMRA is valid against both Union and Employer, because there was a breach of the preliminary recognition agreement and because the Employer collaborated with the Union's unfair representation.

The usual case, which is well defined by the cases, is a suit against the union for unfair representation and against the employer for breach of the final, written labor agreement. Such a suit is typical of stage 3 described above. For the courts to confine their jurisdiction to *stage 3 cases* is to leave out of the reckoning the instances of unfair representation which occur at stages 1 and 2.

In *Local Union No. 12* v. *N.L.R.B.*, 368 F. 2d 12 (1966) the court suggested that "where the aggrieved employee's claim is not founded on a breach of the bargaining contract, but rather is based squarely upon an alleged violation of the union's duty of fair representation, the unfair labor practice jurisdiction of the Board will apparently be exclusive, totally preempting that of the courts." (p. 22) This dictum cannot be squared with dicta in *Vaca* or with later cases (*infra*).

Be that as it may, it leaves unconsidered the role of *employer cooperation* in the union's unfair representation and the effect of breach of the initial recognition agreement (whether oral or written) which preceded all collective bargaining. This means it also slighted the legal meaning of *representation* and of "representative".

Plaintiffs' theory of their case unpacks the legal implications of the words "representative" and "representatives" as used by the Railway Labor Act (*passim*) and by the LMRA in section 9(a). A similar, if not precisely

identical, dissection of implications from those words was made by this Court in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192. There, as here, it was *compliance* with the underlying labor contract *as written*, not *violation* of its terms, which constituted the unfair representation found by this Court. Nevertheless, in construing Section 1, Sixth, of the Railway Labor Act, this Court wrote:

> "• • • The use of the word, 'representative', • • • plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent." (p. 199)

> "• • • The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents." (p. 202)

To the same effect see *Tunstall* v. *Brotherhood*, 323 U. S. 210, where the Supreme Court said:

> "We also hold that the right asserted by the petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right *implied* from the statute and the policy which it has adopted." (emphasis added; p. 213)

Can anything less be said of the duty of a "representative" (and its implications) under LMRA, even if paragraphs 24 and 26 of the complaint in the instant case are not (as they could be) regarded as claims of breach of contract? It is precisely petitioners' contention that the duties implied from the word, "representative," in

the statute *and in the labor contract* were violated. In other words, as this Court recognized, Congress did not use the word, "representative", as a mere exercise of nominalism. The word in its statutory context has a manifest and intended content or definition which confines it to *fair* as distinguished from *unfair* or *perfunctory* representation. Certainly Congress never intended unfair representation.

2. Since a motion to dismiss a complaint before trial takes the well pleaded allegations as true, the issues raised by the complaint here are of national importance to all employees represented by unions as statutory agents. Their resolution can fill in the gaps of the legal theory to-day supporting unfair representation cases. The Third Circuit's decision concerned a significant question of federal law which has not been, but should be, settled by this Court; and the Third Circuit decided it in a way which conflicts with the dicta of this Court in *Vaca,* as quoted and italicized above. The existence of a serious legal question here is attested by the length of the study given to it by the Third Circuit, which even asked for supplementary Briefs from the parties.

3. The precise questions presented here were never before raised in any other case, so far as petitioners' attorneys have been able to ascertain. The Third Circuit's ruling severely limits and curtails the judicial remedies at the disposal of aggrieved employees confronted by an adversary combination of their employer and their union. At the same time, it expands the area wherein *unfair* representation by a union in combination with the employer may be practiced with impunity.

Remedy by resort to the NLRB is difficult if not altogether impossible as shown by the extremely few cases of unfair representation processed by the Board; and by

the further fact that the Board refuses to issue complaints on such charges unless the aggrieved employee can prove the Union's personal hostility against plaintiffs. In addition, employees experience many difficulties. (*Miranda Fuel Co.*, 140 N.L.R.B. 181, 326 F. 2d 172 (1963)) in involving the employer in an NLRB charge of unfair representation against the statutory agent. Nor is relegation of petitioners to the NLRB possible in view of that Board's statute of limitations. Neither is it consistent with *Vaca* v. *Sipes*, 386 U. S. 171 (1969) and *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971).

4. Important constitutional issues underlie union shops where, as here, the rights of minority members of a bargaining are suppressed or neglected by the powerful and hostile combination of employer and union, the latter wielding the bludgeon of compulsory unionism.

It was this Court, not legislators or administrative or quasi-judicial agencies, which fashioned the tool of unfair representation cases, in the *Wallace*,* *Steele* (*supra*), *Tunstal* (*supra*), *Vaca* (*supra*) and other cases, according to the opportunities presented by the cases before it. The instant case, it is respectfully submitted presents a new opportunity to expand this relief beyond its present incomplete state.

Therefore, this case presents an important statutory issue which could open up hitherto locked doors for unfair representation suits and which is in itself significant, as a matter of first impression, in relevantly construing Section 301 LMRA and the meaning of "representative" in that Act.

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* *Wallace Corporation* v. *NLRB*, 323 U. S. 248 (1944).

It seems shockingly wrong to tell these petitioners that they have no remedy and no forum wherein to prove their case.

5. This Court has recognized the aforementioned three stages of the process of collective bargaining (viz.,: (1) recognition and collective bargaining proper; (2) agreement and execution of a contract; and (3) application and enforcement of the labor contract) in any one or more of which unfair representation can and does take place. This means, logically and semantically, that in stages (1) and (2), where breach of the final, written contract is not possible, the allegation of *such* breach is not a possible or reasonable requirement. It is only possible at stage (3). To confine unfair representation cases to breach of *final* labor contract cases is to leave out of reckoning two important areas, *i.e.*, stages (1) and (2), where unfair representation can take place without breach of the final labor contract. But stages (1) and (2) may involve breach of the initial agreement of recognition.

6. Finally, in *Czosek* v. *O'Mara*, 397 U. S. 25; 90 S. Ct. 770 (1970), this Court affirmed the Second Circuit in granting to the "wrongfully discharged" plaintiffs "leave to maintain their action against the railroad [employer] if they should choose to amend their complaint to allege that the employer was somehow implicated in the union's discrimination." (p. 772)

The Court seemed to rule that the employer need only be alleged to have been somehow "implicated" in the union's unfair representation. This is confirmed by the statement in the next page of *Czosek*:

> "The Court of Appeals permitted the railroad to be made a party to the suit if it is properly alleged that the discharge was a consequence of the union's discriminatory conduct or that the employer

was *in any other way implicated in the union's* alleged discriminatory action." (p. 773; emphasis added).

As appears from the complaint, the employer in the instant case *was implicated* in the union's unfair representation by aiding and abetting it in the bargaining process to discriminate against plaintiffs and the class they represent; thus serving its own financial interests.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

October 5, 1972.

Respectfully submitted,

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APPENDIX

Complaint

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Plaintiffs,

vs.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC., ANTHONY MAKRIS as President of said Local 1470, and WESTERN ELECTRIC COMPANY INCORPORATED, (KEARNY WORKS),

Defendants

(Civil Action)

Plaintiffs, complaining of defendants, by their attorneys, Grosman & Grosman, respectfully allege:

1. This Court has jurisdiction of this action under Sec. 301, Labor Management Relations Act of 1947, as amended (hereinafter "LMRA.")

2. Plaintiffs are residents and citizens of the State of New Jersey, being domiciled as follows:

(a) Myron Leskiw, 728 Ridge Street, Newark, N. J. 07104;

(b) Sidney Lurinsky, 27 Peach Lane, Oakridge, N. J. 08557;

(c) Donald Washington, 370 Stiles Street, Union, N. J.;

(d) Frank Opalock, 69 Emerald Place, Clark, N. J. 07066;

(e) John Quinn, 602 11th Street, Union City, N. J.

(f) Robert Kostozewski, 18 Ricord Street, Newark, N. J.

3. All plaintiffs are, and for years have been, members in good standing of Local 1470 I.B.E.W., AFL-CIO-CLC (hereinafter "Local 1470").

4. Local 1470 is, and at all of the times hereinafter mentioned was, a "labor organization" under LMRA.

5. Defendant, Anthony Makris, is, and for about five years was President of Local 1470.

6. Defendant, Anthony Makris, is domiciled at 23 O'Brien Court, Bayonne, N. J.

7. Defendant, Local 1470, has its office and principal place of business at 2 Central Avenue, Kearny, N. J.

8. Defendant, Western Electric Company, Incorporated (hereinafter "Western Electric"), is a corporation having its office and place of business in Kearny, N. J.

9. Western Electric is, and long has been, employer of plaintiffs and of the class they represent.

10. Plaintiffs bring this action, pursuant to Rule 23 F.R.C.P., for themselves and for the entire class of "Testers-Inspectors" employed by Western Electric at its Kearny Works.

11. The class represented by plaintiffs is so numerous, comprising some 500 Testers-Inspectors in the involved bargaining unit, that their joinder as parties plaintiff in this action is impracticable.

12. Plaintiffs, as representatives of said class do, and will, fairly and adequately represent and protect the said class.

13. All plaintiffs, those named above and those in the said class are and at all relevant times have been employees of defendant, Western Electric at its Kearny Works, Kearny, New Jersey (hereinafter sometimes called "Employer").

14. Employer is an "employer" within the meaning of LMRA.

15. For many years, Employer and Local 1470 negotiated and signed collective bargaining agreements covering plaintiffs, the class they represent and many other employee-members of Local 1470, totaling some 15,000 employees of Employer.

16. Copies of the current labor contract, executed June 26, 1969, and effective from said date to 11:59 p.m. on

June 25, 1971 are in the possession of the respective parties; and a copy will be available to this Court as needed.

17. All Testers-Inspectors in the said class perform similar and allied work, which consists of inspecting and testing apparatus, devices and modules manufactured or assembled at the aforesaid Kearny Works of Employer.

18. Under a prior supplementary labor contract dated December 12, 1964, between Local 1470 and Employer and beginning in December 1964, Testers-Inspectors (like plaintiffs and the class they represent) were divided by defendants into two groups:

(i) Day Workers, i.e., those working on non-productive work and without incentives;

(ii) Supplementary or meantime workers to whom a supplement of 50¢ is also paid.

19. This two-fold grouping of Testers-Inspectors was continued in each labor contract between Local 1470 and Employer since and including the one negotiated in 1964; namely, in 1964, in 1966, in 1968 and in 1969.

20. The effect of this grouping of Testers-Inspectors by defendants, has been to underpay some Testers-Inspectors by comparison with what Employer pays and is required (by defendants' labor contracts) to pay to other Testers-Inspectors; even though the underpaid Testers-Inspectors perform functions and work identical or practically identical with what the advantaged Testers-Inspectors perform.

21. Another effect of the artificial grouping aforesaid of Testers-Inspectors by defendants has been discrimina-

torily to deprive many Testers-Inspectors of wage increases granted to all other employees, under the Job Grading Agreement between defendants.

22. Still another effect of this artificial grouping of Testers-Inspectors by defendants has been discriminatorily to deprive many Testers-Inspectors of the benefits and advantages of supplements or incentives allowed to most other employees on wage-incentive work.

23. Defendant, Local 1470, and its officers have jointly and severally failed to discharge their respective duties as statutory representatives of the involved Testers-Inspectors (who are members of said Local) in that said defendants, in cooperating with defendant Employer, neglected and arbitrarily disregarded the fair interests of said Testers-Inspectors.

24. Defendants have, in their negotiation and application of the current and past labor contracts, ever since December, 1964, treated Testers-Inspectors with unfair discrimination and virtual hostility, neglecting or disregarding in bad faith and arbitrarily, all their just complaints and grievances.

25. Defendants, while arranging for wage increases for other employees represented by Local 1470, arbitrarily and discriminatorily denied plaintiffs similar wage increases as well as opportunities for wage increases, incentive and supplements. In this way defendants unfairly and unreasonably discriminated against plaintiffs and their class.

26. Defendant Union has been guilty of gross nonfeasance in representing plaintiffs and their class, as well

as hostile discrimination in their arbitrary and capricious refusal to process the just claims and grievances of said plaintiffs and class.

27. Defendant, Local 1470, and its officers have jointly and severally failed in their respective duties as statutory representative of the involved Testers-Inspectors by permitting the aforesaid nonfeasance and discrimination, and by treating them with hostility and arbitrary discrimination.

28. By their conduct aforesaid, defendants treated plaintiffs and the class they represent in an arbitrary unfair, invidious and irrelevant manner in matters concerning plaintiffs' and said class's status as employees.

29. Plaintiffs and said class at all times duly fulfilled the terms and conditions of their employment with Western Electric.

30. By reason of the premises, plaintiffs and the class they represent were grievously damaged during the past six years by loss of earnings in a large amount (exceeding $20,000) whose dollar value can only be ascertained by examinations before trial.

WHEREFORE, plaintiffs demand judgment:

(a) In damages as to loss of wages suffered by plaintiffs and their class because of defendants' aforesaid conduct;

(b) Requiring defendants to negotiate in good faith for wage increases for plaintiffs and the class they represent in an amount fairly comparable with the wages of other related employees for whom, during the past years, wages were discriminatorily increased; and

(c) Enjoining defendants from further discrimination against plaintiffs in the negotiation and application of labor contracts.

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Opinion of United States District Court, District of New Jersey

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Plaintiffs,

vs.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC., ANTHONY MAKRIS as President of said Local 1470, and WESTERN ELECTRIC COMPANY INCORPORATED, (KEARNY WORKS),

Defendants

(Civil Action No. 594-70)

Appearances:

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Attorneys for Plaintiffs

GODFREY P. SCHMIDT, Esq. (New York Bar)
Of Counsel

Opinion of United States District Court, District of New Jersey

Cerreto La Penna, Esqs.
By: Jerome J. La Penna, Esq.
Attorneys for Defendants, Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC., Anthony Makris as President of said Local 1470

Pitney, Hardin & Kipp, Esqs.
By: S. Joseph Fortunato, Esq.
Attorneys for Defendant, Western Electric Company, Incorporated, (Kearny Works)

Coolahan, District Judge:

This is a class action brought by six individuals, members of defendant Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC ("Local 1470"). Plaintiffs purportedly represent a class of employees of Western Electric called "Testers-Inspectors". Defendants, in addition to Western Electric, are Local 1470 and Anthony Makris in his capacity as President of said Local.

Plaintiffs bring this action pursuant to Rule 23, Fed. R. Civ. P., for themselves and for a group of Testers-Inspectors employed by Western Electric at its Kearny Works. They allege that the class they represent is so numerous, comprising some five hundred in the involved bargaining unit, that their joinder as parties plaintiff is impracticable. Jurisdiction is allegedly founded under §301 of the Labor Management Relations Act, as amended. 29 U.S.C. §185.

The complaint states that some Testers-Inspectors are underpaid as compared to other Testers-Inspectors even though all employees in this class perform substantially

similar and allied work. As their job title suggests, this work consists of testing and inspecting apparatus, devices and modules manufactured or assembled at the Kearny facilities.

Under a prior supplementary labor contract dated December 12, 1964, between Local 1470 and Western Electric, Testers-Inspectors were divided by defendants into two groups:

1. Day workers, *i.e.*, those working on non-productive work and without incentives;
2. Supplementary or meantime workers to whom a supplement of fifty cents is also paid.

This two-fold grouping was continued in each labor contract between Local 1470 and Western Electric since and including the one negotiated in 1964; namely, in 1964, in 1966, in 1968 and in 1969.

In addition to being underpaid, plaintiffs contend that the effect of this grouping has been to discriminatorily deprive many Testers-Inspectors of wage increases granted to other employees. It is further contended that another effect of this grouping has been to deprive some members of this class of the benefits and advantages of supplements or incentives allowed to most other employees on wage-incentive work.

In distilled essence, plaintiffs charge defendant Local 1470 and its president with unfair representation of the involved Testers-Inspectors. It is alleged that these defendants, in cooperating with defendant Western Electric neglected and arbitrarily disregarded the fair interests of plaintiffs and their class when negotiating said labor contracts.

Relief is sought by way of damages for loss of wages, an order requiring the defendants to negotiate wage increases and an order enjoining defendants from further discrimination in the negotiation and application of labor agreements.

Both defendants have now moved for dismissal on the grounds of lack of jurisdiction over the subject matter. They contend that there has been a failure to allege a violation of the collective bargaining agreement and a failure to exhaust internal union remedies. This court finds the first contention to be dispositive of the motions before it and, therefore, does not find it necessary to consider the second.

Sec. 301 of the Labor Management Relations Act, 29 U.S.C. §185(a) provides as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The above quoted section states that there must be a violation of the labor contract before this court can acquire jurisdiction. None has been alleged in the instant complaint. Notwithstanding the express statutory language, plaintiffs argue that the case of *Vaca* v. *Sipes*, 386 U. S. 171 (1967), has enlarged that jurisdiction. It is contended in plaintiffs' brief that "the *Vaca* case in part relies on

§301 LMRA, 29 U.S.C. 185, and in part it goes beyond that section into 'traditional' court jurisdiction and judge-made law derived from equitable and logical unpacking of the implications of the idea of statutory representation of employees by unions". It is further argued that a Federal statute is less important than the "common law" of labor relations for the purpose of jurisdiction over this case.

I find these contentions unpersuasive.

The *Vaca* case involved an employee, Owens, who was discharged for poor health upon his return from sick leave. To secure his reinstatement, a griveance was filed and processed through the first four steps of the grievance procedure. During the fourth grievance step the union sent the employee to a physician for a more complete examination. The report was unfavorable to the employee and the union decided not to take the grievance to arbitration. Owens instituted suit against the union in a state court of Missouri. He alleged that the union had "arbitrarily, capriciously and without just or reasonable reason or cause" refused to take his grievance to arbitration under the bargaining agreement's greivance procedures.

A jury awarded Owens $7000 compensatory damages and $3300 punitive damages. After the trial judge had set the verdict aside on the ground that the National Labor Relations Board had exclusive jurisdiction of the controversy, the Supreme Court of Missouri reversed and reinstated the verdict.

The United States Supreme Court held that the NLRB did not have exclusive jurisdiction over this controversy, and that the preemption doctrine does not apply to the

alleged breach of the union's duty of fair representation. It held further, that an individual employee may recover against his employer in an action under §301 where the employer repudiates the contractual provisions for grievance settlement. Recovery was also said to be permissible where the union has failed, in bad faith, or through arbitrary or discriminatory conduct to properly represent the employee by processing his grievance under the contract for procedure.

Unlike the instant case, however, the *Vaca* case did involve a breach of contract. Plaintiffs, it seems, would have this court read *Vaca* in a much broader context, *i.e.*, to extend §301 jurisdiction to alleged unfair conduct in the *negotiation* of labor contracts in addition to suits for their violation. This court finds that neither *Vaca* nor its progeny authorizes such an extension of our jurisdiction.

Admittedly, the majority opinion in *Vaca* contains some discussion by way of dicta concerning employee rights to judicial cognizance of suits for alleged unfair representation. Nowhere, however, does this court find authority in the case for the proposition that §301 suits may be maintained for alleged unfair representation without any allegation of a concurrent breach of contract. Cases cited by plaintiffs to this end are easily distinguished as cases arising under the Railway Labor Act and not §301 of LMRA, *e.g.*, *Czosek* v. *O'Mara*, 397 U.S. 25 (1970); *Steele* v. *L. & N.R. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood*, 323 U.S. 210 (1944).

Many cases have held that §301 should not be given a narrow reading in view of the congressional intention to have the administration of collective bargaining contracts accomplished under a uniform body of substantive law.

Smith v. *Evening News Assoc.*, 371 U.S. 195 (1962); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Chasis* v. *Progress Mfg. Co.*, 382 F. 2d 773 (3rd Cir. 1967). Congress, however, in enacting this section expressly required a breach of a labor contract as a prerequisite to jurisdiction by a Federal district court. *Palnau* v. *Detroit Edison Co.*, 301 F. 2d 702 (6th Cir. 1962). Further, in enacting the Labor Management Relations Act, Congress knowingly set up a system in which to some extent the interests of particular individuals may be subordinated to the interests of the group both at the contract negotiation stage and thereafter. See *Acuff* v. *United Papermakers and Paperworkers*, 404 F. 2d 169, 171 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969).

The policy of §301 is to promote industrial peace by making collective bargaining agreements enforceable in district court. *Textile Workers Union* v. *Lincoln Mills, supra; Retail Clerks Union, Local 122, AFL-CIO* v. *Alfred M. Lewis, Inc.*, 327 F. 2d 442 (9th Cir. 1964). Plaintiffs would have this court employ §301 for an opposite policy, *i.e.*, to prevent enforcement of the express terms of such agreements.

The allegations of the complaint in the instant case closely parallel those set forth in the opinion of Judge Kalodner in *Adams* v. *Budd Company*, 349 F. 2d 368 (3rd Cir. 1965). In affirming the trial court's dismissal of a §301 complaint, the court observed:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert were independently, and pre-agreement, vested in them by their 'contract of hire'". 349 F. 2d at 370.

Though this case was decided prior to *Vaca* v. *Sipes*, *supra*, I find nothing in my reading of *Vaca* which would modify the result.

Mr. Justice Fortas, in his concurring opinion in *Vaca*, expressly recognized that the Court's majority opinion still required a §301 suit to be couched in breach of contract terms. He states:

> "The Court's difficulty, it seems to me, reflects the basic awkwardness of its position: It is attempting to force into the posture of a contract violation an alleged default of the union which is not a violation of the collective bargaining agreement but a breach of its separate and basic duty fairly to represent all employees in the unit." 386 U.S. at 201.

Finally, and perhaps most importantly, one must inquire as to the potential consequences should suits like this be allowed to be maintained. Surely the salutary objectives of §301 would not be fostered. Every dissident faction of union members would be able to bring suit in district court by simply alleging unfair representation should they find themselves dissatisfied with the bargain struck by their lawfully elected representatives. This is not to suggest that relief should not be available for legitimate grievances of this kind; relief is available, but under the auspices of the National Labor Relations Board pursuant to an unfair labor practice complaint. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962);* *Local 12, United Rubber*

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* The decision of the NLRB was denied enforcement by the Court of Appeals for the Second Circuit but on a basis which did not decide the point relevant here. Only one Judge, Judge Medina, took the position that the NLRB was incorrect in holding that the violation of the duty of fair representation was an unfair labor practice.

Workers v. *NLRB*, 368 F. 2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967), *rehearing denied*, 389 U.S. 1060 (1968). Under the preemption doctrine defined in *Santiago Building Trade Council* v. *Garmon*, 359 U.S. 236 (1959), the NLRB has exclusive jurisdiction over allegations such as those in the instant complaint where no concurrent breach of contract exists.

Defendants' motions for dismissal of the complaint must prevail. Let appropriate orders in conformity with the views herein expressed be presented.

Final Judgment of Said District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION 594-70

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN, and ROBERT KOWTOZEWSKI,

Plaintiffs,

vs.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC., ANTHONY MAKRIS, as President of said Local 1470, and WESTERN ELECTRIC COMPANY, INCORPORATED, (KEARNY WORKS)

Defendants.

This matter having been opened to the Court on Monday, September 28, 1970, before the Honorable James A. Coolahan, on Motion to Dismiss the Complaint, by Pitney, Hardin & Kipp (S. Joseph Fortunato, Esquire, appearing), attorneys for defendant Western Electrical Company, Incorporated, and on Motion to Dismiss the Complaint by Cerreto & LaPenna (Jerome J. LaPenna, Esquire, appearing), attorneys for defendants Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC, and Anthony Makris as President of said Local 1470, and in the presence of Grossman & Grossman (Allan

M. Grossman, Esquire, appearing) attorneys for plaintiffs Myron Leskiw, Sidney Lurinsky, Donald Washington, Frank Opalock, John Quinn, and Robert Kowtozewski, and Godfrey P. Schmidt, Esquire, of counsel to attorneys for plaintiffs, and the Court having considered the Complaint and the briefs in support and opposition to the aforesaid Motions and having heard the oral arguments of counsel for all parties, and the Court having rendered and filed its written opinion on October 28, 1970;

IT IS, on this 17th day of November, 1970,

ORDERED that:

1. The Motions of all defendants to Dismiss the Complaint be and the same are hereby granted; and

2. Final Judgment be and the same is hereby entered dismissing the Complaint, without costs to any party as against any other party.

/s/ JAMES A. COOLAHAN,
U.S.D.J.

Consent as to form.

GROSSMAN & GROSSMAN
Attorneys for Plaintiffs
By ALLAN M. GROSSMAN

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1077

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Appellants,

v.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC., ANTHONY MAKRIS, as President of said Local 1470, and WESTERN ELECTRIC COMPANY, INCORPORATED, (KEARNY WORKS).

(D. C. CIVIL ACTION No. 594-70)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued January 5, 1972

Before KALODNER, GANEY* and ROSENN,
Circuit Judges

*Judge Ganey participated in the argument and disposition of this case but died before this opinion was filed.

Opinion of the United States Court of Appeals for the Third Circuit

OPINION OF THE COURT

(Filed July 7, 1972)

KALODNER, *Circuit Judge.*

The six plaintiffs, members of the defendant Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC, are employed as Testers-Inspectors[1] by the defendant Western Electric Company, Incorporated (Kearny Works).

Asserting existence of federal jurisdiction under Section 301(a) of the Labor-Management Relations Act of 1947, as amended,[2] they brought this action in the court below in May 1970. In their Complaint they allege, in sum, that (1) they represent a class of Western Electric employees called Testers-Inspectors; (2) the current 1969 Local 1470—Western Electric collective bargaining agreement, as well as its three predecessors since 1964, arbitrarily and unjustifiably divides Testers-Inspectors into

---

[1] Testers-Inspectors inspect and test products manufactured and assembled by Western Electric Company.

[2] 29 U.S.C.A. Section 185(a)

Section 301(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

two classifications with consequent loss of wages to some of them; and (3) Local 1470, and its president, the defendant Anthony Makris, in negotiating the current collective bargaining agreement and its predecessors, "failed to discharge their respective duties as statutory representatives of the involved Testers-Inspectors . . . in that they . . . in cooperating with defendant Employer, neglected and arbitrarily disregarded the fair interests of said Testers-Inspectors."

Plaintiffs, in their Complaint, sought the following specified relief—(1) damages for loss of wages; (2) a judgment "[r]equiring defendants *to negotiate* in good faith for wage increases for plaintiffs and the class they represent in an amount fairly comparable with the wages of other related employees for whom, during the past years, wages were discriminatingly increased"; and (3) an order "[e]*njoining the defendants from further discrimination against plaintiffs in the negotiation and application* of labor contracts." (emphasis supplied).

The defendants moved to dismiss the Complaint on these grounds: (1) lack of jurisdiction under Section 301(a) because the Complaint did not allege violation of the collective bargaining agreement on the part of the defendants; and (2) the plaintiffs had failed to exhaust available union remedies.

The District Court granted the dismissal motions on the first ground. In its Opinion accompanying its "Final Judgment" of dismissal, it held that under Section 301(a) ". . . there must be a violation of the labor contract before this court can acquire jurisdiction," and "[n]one has been alleged in the instant Complaint." The District Court further stated:

> "*Congress . . . in enacting this section expressly required a breach of a labor contract as a prerequisite to jurisdiction by a Federal district court.* Palnau v. *Detroit Edison Co.*, 301 F. 2d 702 (6th Cir. 1962). Further, in enacting the Labor Management Relations Acts, Congress knowingly set up a system in which to some extent the interests of particular individuals may be subordinated to the interests of the group both at the contract negotiation stage and thereafter. See *Acuff* v. *United Papermakers and Papersworkers*, 404 F. 2d 169, 171 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969)." (emphasis supplied).

The District Court cited in support of its stated holding *Adams* v. *Budd Company*, 349 F. 2d 368 (3 Cir. 1965), where we ruled to the same effect. It rejected the plaintiff's contention that *Vaca* v. *Sipes*, 386 U.S. 171 (1967), later decided, had otherwise construed Section 301(a) and enlarged its jurisdiction to encompass an action which did not allege or involve violation of a collective bargaining agreement. The District Court noted that *Vaca did* involve a breach of the collective bargaining agreement.

We agree in every respect with the District Court's disposition, and its holding that "[t]he allegations of the complaint in the instant case closely parallel those set forth" in *Adams*.

In *Adams*, the plaintiffs, who were employees of the defendant, The Budd Company, and members of the defendant Union, alleged in their complaint that Budd and the Union, "collusively" and "in bad faith," conspired to deprive them of a "super-seniority" status which they had

acquired under their "original contract of hire" and earlier labor contracts, in negotiating a new collective bargaining agreement. The complaint did *not* allege a breach of the agreement itself. Noting that diversity jurisdiction did not exist, we found that the critical question presented was whether federal jurisdiction in such an action existed under Section 301(a).

In doing so we said at 349 F. 2d 369-370:

> "The plaintiffs seem to be oblivious of the fact that Section 301(a) only creates federal jurisdiction, in the absence of diversity of citizenship, with respect to '[*s*]*uits for violation of contracts* between an employer and a labor organization . . . or between any such labor organizations.' (emphasis supplied). [footnote omitted].
>
> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert were independently, and pre-agreement, vested in them by their 'contract of hire.'
>
> "We are of the opinion that Section 301(a) did not confer jurisdiction upon the District Court to entertain this action and that it should have dismissed it for that reason.
>
> . . . .
>
> "In the instant case there is no complaint or contention that Budd and Union violated a provision of a collective bargaining agreement."

In the instant case, as in *Adams*, there is no diversity of citizenship since all the parties are citizens of the State

of New Jersey. Also, as in *Adams*, there is no allegation or contention here that the collective bargaining agreement was violated. As the District Court stated "[i]n distilled essence, plaintiffs charge defendants Local 1470 and its president with unfair representation of the involved Testers-Inspectors," and that they "in cooperating with defendant Western Electric, neglected and arbitrarily disregarded the fair interests of plaintiffs and their class when negotiating said labor contracts."

What has been said is dispositive of the critical issue presented by this appeal.

The Final Judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-547

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Petitioners,

v.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC, ANTHONY MAKRIS, as President of Said Local 1470 and WESTERN ELECTRIC COMPANY, INC., (KEARNY WORKS),

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief for Respondents Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC, and Anthony Makris, as President of Said Local 1470 in Opposition

Questions Presented

1. Whether the United States District Court on a complaint asserting jurisdiction under Section 301 of the

Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185 has jurisdiction in the absence of an allegation of violation of a collective bargaining agreement?

2. Whether an allegation in a complaint asserting breach of a recognition agreement or clause, though not made in the complaint in the instant case, by means of an alleged breach of a Union's duty of fair representation is a sufficient allegation of breach of contract to satisfy the requirement for Section 301 jurisdiction?

3. Whether the allegations of the petitioners' complaint are sufficient for jurisdiction under Section 301 of the LMRA and whether said allegations are sufficient as a basis for the claims of unfair representation by the Union.

Statutory Provisions Involved

1. Section 301, Labor Management Relations Act of 1947, as amended 61 Stat. 156, 28 U.S.C. 185:

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chap-

ter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Statement of the Case

Petitioners commenced the action in the United States District for the District of New Jersey alleging jurisdiction under Section 301 of the Labor Management Rela-

tions Act, as amended, (hereinafter LMRA), 61 Stat. 156, 29 U.S.C. 185.

The petitioners are six employees of Western Electric Company, Incorporated (hereinafter Western) and are members of Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC (hereinafter the Union) which represents a collective bargaining unit consisting of employees of Western. The petitioners commenced this action as a class action and purport to represent a class of employees called "Testers-Inspectors" who are in the said bargaining unit represented by the Union.

The gravamen of the complaint filed by the petitioners in this action, is that some of the class of employees represented by the petitioners are being underpaid as compared with other members of the class of Testers-Inspectors as a result of the effect of a contract negotiated in December, 1964 which established two groups of Testers-Inspectors:

1. "Day workers; i.e., those working on non-productive work and without incentives" and

2. "Supplementary or meantime workers to whom a supplement of $.50 is also paid."

The complaint alleges unfair discrimination by the Union and Western in the negotiation of the contract which established the two groups of Testers-Inspectors and continued in successive collective bargaining agreements between the Union and Western, namely those of 1964, 1966, 1968 and 1969. The plaintiffs' action was commenced in May, 1970.

The petitioners' complaint does not allege a violation of any of the collective bargaining agreements referred to

therein. Allegations of the complaint are couched in terms of conclusions and the complaint does not allege facts to support such conclusions. In effect the allegations of hostile and arbitrary discrimination and arbitrary, unfair, invidious and irrelevant treatment by the respondents is based upon the aforesaid establishment of two groups of Testers-Inspectors and on the resultant fact that some Testers-Inspectors were paid on an incentive basis, some were not paid on such basis, and as a consequence, some were underpaid.

Relief sought in the complaint is by way of damages for alleged wage losses, an order requiring the respondents to negotiate in good faith for wage increases and an order enjoining respondents from further alleged discrimination in the negotiation and application of labor contracts.

The respondents, Western, the Union and Anthony Makris, as President of Local 1470 (hereinafter Makris), made separate motions to dismiss the complaint in the District Court and the Court dismissed the complaint of petitioners pursuant to said motions on the ground of lack of jurisdiction over the subject matter. The petitioners appealed to the United States Court of Appeals for the Third Circuit from the judgment of the United States District Court dismissing the petitioners' complaint. Prior to the hearing before the Circuit Court of Appeals, respondents notified the Court of two decisions which were decided and reported subsequent to the submission of the original briefs to the Court of Appeals, which may have related to issues before the Court. The said cases were *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971), and *Richardson* v. *Communications Workers of America*, 443 F. 2d 974 (8th Cir. 1971). At the oral argument the Court of Appeals granted the parties leave to submit supplementary briefs directed particu-

larly to the effect of the said decisions on the decision of the Circuit Court in *Adams* v. *Budd*, 349 F. 2d 368 (3rd Cir. 1965). Supplementary briefs were submitted by appellants and respondents. The Court of Appeals affirmed the judgment of the United States District Court for the District of New Jersey.

The petitioners herein petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254 (1). The respondents, Local 1470, I.B.E.W., AFL-CIO-CLC, and Anthony Makris as President of Local 1470, oppose the petition for a Writ of Certiorari.

ARGUMENT

I

The decision of the United States Court of Appeals for the Third Circuit in this case is not in conflict with the decisions of other Courts of Appeal and is not in conflict with the decisions of this Court on the same matter.

In order to invoke the jurisdiction of the United States District Court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, it is essential that the complaint contain an allegation or allegations of a violation of a collective bargaining agreement. *Local Union No. 12* v. *NLRB*, 368 F. 2d 12 (5th Cir. 1966), cert. denied 389 U. S. 837 (1967), re-hearing denied 389 U. S. 1060 (1968); *Adams* v. *Budd*, 349 F. 2d 368 (3rd Cir. 1965). Where a complaint alleges unfair representation by a Union or by a Union in conspiracy or collusion with an employer or in cooperation with an employer during

the negotiation of a collective bargaining agreement and does not allege a breach of an existent agreement, such allegations do not give a Court jurisdiction under Section 301 but rather constitute charges of breach of duty of fair representation capable of being remedied by the National Labor Relations Board within its exclusive jurisdiction by reason of the preemption doctrine enunciated by this court. The United States Court of Appeals for the Eighth Circuit stated in the case of *Woody* v. *Sterling Aluminum Products*, 365 F. 2d 448 (8th Cir. 1966), cert. denied 386 U. S. 957, (1967):

> "Our remaining jurisdictional issue concerns those allegations in Count I charging the Union with conspiring and colluding with Sterling, bargaining in bad faith to plaintiffs' detriment and failing to represent plaintiffs fairly and honestly. The District Court held that the plaintiffs' charges of the Union's bad faith in negotiating the collective bargaining agreement were not predicated upon the collective bargaining agreement so as to give the Court jurisdiction under § 301, but rather looked beyond the agreement to the exclusive bargaining representatives' obligation of fair representation and was within the exclusive jurisdiction of the National Labor Relations Board. We think this holding was correct. San Diego Bldg. Trades Council v. Garmon, supra, Local No. 100 v. Borden, 373 U. S. 690, 53 LRRM 2322 (1963); Local No. 207 v. Perko, 373 U. S. 701, 53 LRRM 2327 (1963)", 365 F. 2d at 456.

In *Adams* v. *Budd Company*, 349 F. 2d 368 (3rd Cir. 1965), a case in point cited in the opinions of the courts below, the Court stated at page 370:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert were independently, and pre-agreement, vested in them by their contract of hire.
>
> We are of the opinion that Section 301 (a) did not confer jurisdiction upon the District Court to entertain this action and that it should have dismissed it for that reason." 349 F. 2d at 370.

The Court in the *Adams* v. *Budd Company* (supra) case arrived at its conclusion upon the Union's contention that the plaintiffs' claim:

> "'. . . is not based upon a violation of a contract between the employer and a labor organization' but 'solely upon the adverse effect upon plaintiffs of the negotiation of such agreement'." 349 F. 2d at 369.

The Court in *Woody* v. *Sterling Aluminum Products*, 365 F. 2d 448 (8th Cir. 1966), cert. denied 386 U. S. 957 (1967), a case similar in fact to the case at bar, was in accord with the decision in *Adams* v. *Budd* (supra) in its holding that allegations of a breach of an existent collective bargaining agreement must be made in the complaint in order to give a Court jurisdiction under Section 301 of the LMRA. An examination of the decisions appears to indicate no conflict among the Circuit Courts of Appeal on this proposition of law. The case of *Vaca* v. *Sipes*, 386 U. S. 171 (1967) did not overrule, change or modify the decisions in the case of *Adams* v. *Budd Company*, 349 F. 2d 368 and the case of *Woody* v. *Sterling Aluminum Products* (supra). The *Vaca* case is on its facts a case involving a direct breach of contract. The case includes

the elements of an allegation of unfair representation combined with an allegation of breach of contract resulting from the alleged unlawful discharge of an employee.

There is little doubt that the duty of fair representation by a Union commences from the moment of certification by the National Labor Relations Board or proof of requisite representation resulting in recognition through the negotiating process to a collective bargaining agreement and thereafter. An allegation of unfair representation at any time is not sufficient in and of itself and alone to invoke jurisdiction under Section 301 of the Labor Management Relations Act unless there is alleged the breach of an existent collective bargaining agreement. An allegation of employer involvement in an unfair representation by a Union without the employer involvement constituting a breach of contract, does not give rise to the Section 301 jurisdiction. *Woody* v. *Sterling Aluminum Products*, 365 F. 2d 448 (8th Cir. 1966), cert. denied 386 U. S. 957 (1967). Unfair representation charges without a related breach of contract gives rise to an unfair labor practice and in such case jurisdiction of the unfair representation case is within the exclusive jurisdiction of the National Labor Relations Board under the preemption doctrine first enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, (1959). The preemption doctrine was more recently restated in *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971).

Where the duties and obligations inherent in the recognition clause of a collective bargaining agreement are breached, such breach is not, as suggested, a violation of a duty imposed by the collective bargaining agreement but is rather a violation of a duty imposed by law commencing and based, as in this case, upon the certification of a

union as the exclusive representative of a bargaining unit by the National Labor Relations Board which has the authority to enforce such duty and obligations. A recognition clause is not truly a creation of agreement but rather the memorial of a relationship created by law. Certification or recognition creates the statutory agency relationship which gives the authority for a union to engage in bargaining on behalf of the employees it represents.

The obligation of a union to the members of the bargaining unit it represents, even if contractual, is one that is implied in law and is not an agreement, the breach of which is cognizable under Section 301 of the LMRA. Both the United States Circuit Court of Appeals for the Eighth Circuit and this Court have clearly enunciated this principle. In *Richardson* v. *Communications Workers,* 443 F. 2d 974, (8th Cir. 1971) the Court stated:

> "The plaintiff pleaded and tried his case on the theory that the Union breached the collective bargaining agreement as to the non-discrimination clause. Assertion of the claim against the Union for breach of contract misconstrues the relationship between the parties to a collective bargaining agreement. The Union is signatory to the agreement on behalf of all the employees. It thus serves in the capacity of a fiduciary to the employees. See, generally, Cox, supra, 57 Mich. L Review at 21. In fact, the rights of the individual employees are the 'major focus' of the bargaining contract with the company. *Smith* v. *Evening News Ass'n.,* supra, at 200. Breach of the agreement by the bargaining agent, which simultaneously conflicts with its role as a fiduciary to the employee, creates a claim for breach of trust of its statutory duty to

> give adequate representation and not for one arising out of the collective bargaining contract." 443 F. 2d at 980.

In *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274 (1971) this Court clearly distinguished the obligation arising from the duty of fair representation from an obligation arising out of a collective bargaining agreement when it stated:

> "The legislative determination that courts are fully competent to resolve labor relations disputes through focusing on the terms of a collective bargaining agreement cannot be said to sweep within it the same conclusion with regard to the terms of union-employee contracts that are said to be implied in law. That is why the principle of Smith v. Evening News is applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself." 403 U. S. at 300.

Thus, the alleged breach of a recognition agreement, in any form, cannot support a claim of violation of a collective bargaining agreement so as to place such breach within the ambit of Section 301 of the LMRA.

In the cases of *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192 (1944) and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76,* 323 U. S. 210 (1944), unfair representation was charged against the union in each case and in both cases consisted of allegations of discrimination as to the race of the employees. The Court found that such discrimination was irrelevant, hostile and invidious. The Court further found that the statutory representative was not barred from negotiating contracts which resulted in unfavorable effects

on some members of the bargaining unit. As to the question of jurisdiction, in both cases the Court analyzed the division of jurisdiction under the Railway Labor Act and concluded that there existed no administrative remedy under the Act for employees charging a union with unfair representation since the Railway Adjustment Board was authorized to deal only with contract violations; i.e., disputes between an employee or groups of employees and the employer arising from grievances or in connection with the interpretation or application of collective bargaining agreements, 48 Stat. 1189, 45 U.S.C. § 153, First (i). Under the LMRA, however, charges of contract violations must be brought in accordance with Section 301 of the LMRA in the United States District Court while all other violations of the LMRA are within the exclusive jurisdiction of the National Labor Relations Board.

At no point in its opinions in the *Steele* (supra) case or the *Tunstall* (supra) case, did the court imply that breach of the duty of a representative, implied in that word, could be considered as converted into a breach of the collective bargaining agreement because the word "representative" is contained in a recognition clause or other clause of the collective bargaining agreement. The petitioners' implication that such a consideration or conversion should be made is not tenable in light of the text of the decisions in *Richardson* v. *Communications Workers,* 443 F. 2d 974 at 980, and *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274 at 300, and the quotations therefrom relative to the distinction between the duty of fair representation and duties arising out of collective bargaining agreements heretofore set forth on pages 10 and 11, respectively.

In *Czosek* v. *O'Mara,* 397 U. S. 25 (1970), another Railway Labor Act case, and jurisdictionally distinguishable

as such, involving alleged unfair representation and wrongful discharge, the Court discussed the issue of allowing the employer to be brought into the unfair representation case and decided that to insure complete and meaningful relief the Courts may properly exercise jurisdiction over both the Union and the employer. The LMRA counterpart to this jurisdiction of the two causes is the common situation in Section 301 cases where the Union is joined on an allegation of unfair representation with the allegation of breach of contract against the employer in a direct action under Section 301 for employer breach of contract.

In conclusion, the petitioners' theory that alleged breach of a preliminary recognition agreement satisfies the requisite of an allegation of violation of contract to invoke federal court jurisdiction under Section 301 is in conflict with the decisions of this Court and with that of the Circuit Court of Appeals. *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971); *Richardson* v. *Communications Workers*, 443 F. 2d 974 (8th Cir. 1971). The contention that an employer's collaboration with or cooperation in the union's alleged unfair representation has been dealt with by the Court of Appeals for the Eighth Circuit and the Eighth Circuit is in accord with the decision of the Third Circuit below, *Woody* v. *Sterling Aluminum Products*, 365 F. 2d 448 (8th Cir. 1966), cert. denied 386 U. S. 957 (1967). The implication sought to be made in the examination of the Railway Labor Act as set out in the petitioners' brief (pages 9 and 10), and its comparative examination of the LMRA with respect to the duties inherent in representation is without merit since although a duty of fair representation is implied under both the Railway Labor Act and LMRA, the violation of a duty of fair representation cannot be converted to a violation of the collective bargaining agreement merely because the

word representative may be contained in a recognition clause or other clause of the collective bargaining agreement. *Motor Coach Employees* v. *Lockridge* (supra) and *Richardson* v. *Communications Workers* (supra). The comparison of the Acts generally and cases under the Railway Labor Act and the LMRA as to jurisdiction is without meaning in the instant case since the jurisdiction under the Railway Labor Act over violations of contract causes of action and unfair representation causes are directly opposite to the jurisdiction over the same causes under the LMRA. Consequently, it is clear that there is no conflict between the decision of the Third Circuit in this case and the decision of other Circuit Courts of Appeal or of this Court.

II

There is no substantial federal question of law raised in the complaint by the petitioners which has not heretofore been determined by this Court nor does the complaint of the petitioners state a substantial federal claim upon which relief can be granted.

In order to sustain a cause of action asserting Section 301 jurisdiction and alleging a breach of the duty of fair representation, it is necessary that the complaint allege (1) a breach of the collective bargaining agreement and (2) a breach of the duty of fair representation.

The petitioners admit that no express allegation was made in their complaint of breach of any of the provisions of the various collective bargaining agreements referred to in the complaint.

With respect to unfair representation, allegations of facts must be made from which a court might reasonably

infer that a union's actions involved those elements necessary to a charge of unfair representation. In *Humphrey* v. *Moore,* 375 U. S. 335, 348 (1964), this Court noted the element of "substantial evidence of fraud, deceitful action or dishonest conduct on the part of the union". Later in *Vaca* v. *Sipes,* 386 U. S. 171, 193 (1967), this Court added the element of "arbitrary or bad faith conduct on the part of the Union". Most recently in *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 301 (1971), this Court considered as requisite elements to a charge of unfair representation that there need be adduced "substantial evidence of discrimination: that is intentional, severe and unrelated to legitimate union objectives".

The petitioners here alleged in their complaint various legal conclusions to the effect that one or more of the respondents have treated the petitioners and the class they purport to represent with arbitrary disregard, unfair discrimination, virtual hostility, neglect in bad faith and nonfeasance, hostile discrimination, arbitrary and capricious acts and in an arbitrary, unfair, invidious and irrelevant manner.

These legal conclusions are based fundamentally upon a single allegation of fact from which other and additional factual conclusions are derived. The single allegation of fact is that in December, 1964, the union entered into a collective bargaining agreement with Western which contained a provision dividing Testers-Inspectors into two groups, day workers and incentive workers, who perform "similar or allied work" (paragraph 17 of the complaint at Petition A. 4) or "identical or practically identical work" (paragraph 20 of the complaint at Petition A. 4) and that that contract and subsequent contracts were enforced by the parties. The conclusion derived from this fact allegation is that one part of the two groups of

Testers-Inspectors was "underpaid" (paragraph 20 of the complaint at Petition A. 4) in comparison with the other group. The single alleged fact and the conclusionary allegations derived from that fact are not sufficient as supportive of the inference of hostile, invidious, arbitrary, unfair and irrelevant discrimination. There are no other allegations of facts in the complaint of the petitioners from which a Court might reasonably draw an inference of hostile, invidious, arbitrary, unfair and irrelevant discrimination.

In the *Steele*, 323 U. S. 192 (1944), *Tunstall*, 323 U. S. 210 (1944) and *Czosek*, 397 U. S. 25 (1970) cases, allegations of facts supporting the respective charges of unfair representation were made. In the case at bar, no such factual allegations were made to support the charge of unfair representation.

The allegation of fact in the instant case does not support the legal conclusions alleged by the petitioners and if jurisdiction under Section 301 were to be founded upon this bare fact allegation then any contract involving differences among employees would be subject to review by a federal court. The effect of such enlargement of the jurisdiction of the courts is clearly evident and was recognized by U. S. District Court Judge Coolahan in his decision below:

> "Finally and perhaps most importantly one must inquire as to the potential consequences should suits like this be allowed to be maintained. Surely the salutary objectives of §301 would not be fostered. Every dissident faction of union members would be able to bring suit in district court by simply alleging unfair representation should they find themselves dissatisfied with the bargain struck by their lawfully elected representatives." (A. 15)

In *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1953) the Court stated:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected."

Most recently, in *Woody* v. *Sterling Aluminum Products*, 365 F. 2d 448 (8th Cir. 1966), cert. denied 386 U. S. 957 (1967), as indicated heretofore a case similar to the one at bar, the Court of Appeals for the Eighth Circuit stated:

> "No precedent has been called to our attention and our research has revealed none that would vest the federal courts with jurisdiction under such circumstances as exist here. Indeed, to rule jurisdiction might well jeopardize the whole concept of collective bargaining as we know it." 365 F. 2d at 457.

The complaint of the petitioners is not one which presents a substantial federal question of law nor one which states a claim upon which relief can be granted by a federal court.

CONCLUSION

For the aforesaid reasons, it is respectfully submitted that the Petition for A Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case should be denied.

November 3, 1972.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-547

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Petitioners,

v.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC, ANTHONY MAKRIS, as President of Said Local 1470 and WESTERN ELECTRIC COMPANY, INC., (KEARNY WORKS),

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT WESTERN ELECTRIC COMPANY, INC. IN OPPOSITION

Questions Presented

1. Does the complaint state a claim cognizable under Section 301 of the Labor Management Relations Act

where there is no allegation of violation of a collective bargaining agreement.

2. Does the assertion (raised for the first time in petitioners' brief before the Court of Appeals) that the Union breached a recognition agreement by breaching its duty of fair representation form the basis for Section 301 jurisdiction where such jurisdiction does not otherwise exist.

3. Assuming Section 301 jurisdiction exists, does the complaint, which predicates conclusionary allegations of hostile, invidious discrimination solely upon the existence of differences in employees' wages under a collective bargaining agreement, state a claim upon which relief can be granted.

Statute Involved

Section 301(a) of the Labor Management Relations Act of 1947, as amended, 61 Stat. 156, 29 U.S.C. §185(a)

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of the Case

The petition to this Court for a writ of certiorari to the Court of Appeals for the Third Circuit pursuant to 62 Stat. 928, 28 U.S.C. §1254(1), is predicated upon the contention that petitioners' complaint states a claim for relief and that such claim is cognizable under Section 301 of the

Labor Management Relations Act of 1947, as amended, 61 Stat. 156, 29 U.S.C. §185.

Petitioners commenced this action in the United States District Court for the District of New Jersey against (1) Western Electric Company, Incorporated (hereinafter "Western") and (2) Local 1470, I.B.E.W., AFL-CIO-CLC (hereinafter the "Union") and Anthony Makris, President of the Union.

Petitioners are six members of the Union and are employees of Western. They and other employees are in a collective bargaining unit for which the National Labor Relations Board has certified the Union as collective bargaining representative.

Western argued in the District Court and Third Circuit that jurisdiction over the subject matter of the complaint did not exist under Section 301 and that the complaint failed to state a claim upon which relief could be granted. Western's motion to dismiss the complaint in the District Court, and the motion of the other respondents, were granted on the ground that jurisdiction was lacking under Section 301. The District Court found it unnecessary to rule with respect to Western's alternative ground for dismissal of the complaint. (Petition, p. 11a). On appeal, the Third Circuit affirmed the decision of the District Court.

In the complaint petitioners purport to represent a class of employees which includes all Testers-Inspectors, although the complaint asserts that some Testers-Inspectors were "underpaid" as compared with what other Testers-Inspectors were paid. The charge is that through the process of collective bargaining Western and the Union agreed to contract provisions under which some employees were paid on a different basis than other employees, resulting in differences in wages accorded em-

ployees under the collective bargaining agreement. It is claimed that this result is the effect of the establishment in December, 1964, of two groups of Testers-Inspectors:

1. "Day workers, i.e., those working on non-productive work and without incentive", and

2. "Supplementary or meantime workers to whom a supplement of 50¢ is also paid." (Paragraph 18 of the complaint; Petition, p. 4a).

The complaint, filed in May, 1970, notes that the same grouping of Testers-Inspectors was included in four successive collective bargaining agreements between Western and the Union, namely those of 1964, 1966, 1968 and 1969.

Based on the establishment of groups paid on a different basis, petitioners allege that they have been subjected to hostile and arbitrary discrimination and treated in an invidous, irrelevant manner. These charges of discrimination apparently rest on the alleged fact that some, but not all, Testers-Inspectors are paid on an incentive basis. No facts are pleaded which support these conclusionary allegations of discrimination.

It is not alleged in the complaint that Western violated any provision of a collective bargaining agreement. Petitioners contend that their action is maintainable under Section 301 because there has been a breach of a "recognition agreement" necessarily resulting from a breach of duty of fair representation. (Petition, p. 9). The complaint asserts no such claim. Petitioners never advanced this claim before the District Court, but raised it for the first time in their brief on appeal to the Third Circuit.

The relief requested in the complaint is: damages for loss of wages, an order requiring the respondents to negotiate wage increases, and an order enjoining respondents from further alleged discrimination in the negotiation and application of labor agreements.

ARGUMENT

I.

The Decision of the Third Circuit is correct and is consistent with the Decisions of this Court and the Courts of Appeals.

The Courts of Appeals for the Third and Eighth Circuits have ruled that an action may not be maintained under Section 301 where there is no allegation of violation of a collective bargaining agreement.

In *Adams* v. *Budd*, 349 F. 2d 368 (3rd Cir. 1965), plaintiff employees, in their action against their employer and union, alleged that they had been deprived of certain seniority rights by reason of the provisions of a subsequently negotiated collective bargaining agreement. The complaint contained conclusionary allegations of conspiracy, arbitrary, capricious and malicious acts and breach of a duty of fair representation. The complaint in the instant case similarly sets out allegations of discrimination, arbitrariness, hostility, neglect, etc. and appears to predicate a claim upon the fact that the collective bargaining agreements negotiated between Western and the Union failed to give plaintiffs certain benefits which it claimed other employees enjoyed. Neither the complaint in this case nor the complaint in *Adams* alleged violation of a collective bargaining agreement. The Court of Appeals in *Adams* held that the District Court did not have jurisdiction under Section 301, stating:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a la-

> bor contract of rights which they assert were independently, and pre-agreement, vested in them by their 'contract of hire'." 349 F. 2d at 370.

In *Woody* v. *Sterling Aluminum Products, Inc.*, 365 F. 2d 448 (8th Cir. 1966), *cert. denied*, 386 U. S. 957 (1967), *rehearing denied*, 386 U. S. 1027 (1967), a group of 193 employees sued Sterling (their former employer) and their union. Sterling and the union had negotiated a collective bargaining agreement which permitted Sterling to close its plant. Sterling's subsequent closing of its plant and release of its employees, including plaintiffs, gave rise to the suit. The Court of Appeals affirmed the District Court's dismissal of the complaint.

In one count of the complaint in *Woody*, the plaintiffs charged the union with "conspiring and colluding with Sterling, bargaining in bad faith to plaintiffs' detriment, and failing to represent plaintiffs fairly and honestly." 365 F. 2d at 456. In affirming the District Court's dismissal of this count of the complaint, the Court of Appeals summarized the lower court's holding

> "that the plaintiffs' charges of the Union's bad faith in negotiating the collective bargaining agreement were not predicated upon the collective bargaining agreement so as to give the court jurisdiction under §301, but rather looked beyond the agreement to the exclusive bargaining representatives' obligation of fair representation and was within the exclusive jurisdiction of the National Labor Relations Board." 365 F. 2d at 456.

The Third Circuit's holding in this case and the holdings in *Adams* v. *Budd*, 349 F. 2d 368 (3rd Cir. 1965) and *Woody* v. *Sterling Aluminum Products, Inc.*, 365 F. 2d

448 (8th Cir. 1966), *cert. denied*, 386 U. S. 957 (1967), *rehearing denied*, 386 U. S. 1027 (1967), are consistent with *Vaca* v. *Sipes*, 386 U. S. 171 (1967). The plaintiff in *Vaca* had been discharged by his employer upon his return from sick leave. Plaintiff there alleged that his discharge had been in violation of the collective bargaining agreement between his employer and union.

On appeal before the Third Circuit and in their petition filed herein petitioners have attempted to bring themselves within the ambit of *Vaca* v. *Sipes*, 386 U. S. 171 (1967), by asserting that this is a Section 301 suit "because there was a breach of the preliminary recognition agreement and because the Employer collaborated with the Union's unfair representation." (Petition, p. 9).

The Union was certified as the collective bargaining representative of a unit of Western's employees, including petitioners, by the National Labor Relations Board. The recognition clause of the collective bargaining agreement between Western and the Union does nothing more than recite the bargaining obligation imposed by law pursuant to the Board's certification.[1] Recognition is not an agreement or contract at all, but rather is the expression of an obligation to bargain imposed by law. Even if a contractual obligation could possibly be viewed as arising from

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[1] "Article 1—Recognition

The Company hereby recognizes the Union as the exclusive representative of the employees in the bargaining unit set forth in Paragraph 12 and the footnotes applicable thereto, of the Agreement for Consent Election executed by the Company and the Union on January 21, 1952.

The recognition is in compliance with the certification of the National Labor Relations Board dated June 25, 1952, in Case No. 2-RC-4359."

recognition in the context of the duty of fair representation, it must be an obligation which runs from a union to the employees which it represents, an obligation which is implied in law. This Court has recently decided that a suit predicated on "union-employee contracts that are said to be implied in law" are not cognizable under Section 301. *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 300 (1971).

II.

The complaint fails to state a substantial federal claim warranting the Court's consideration.

The complaint alleges that all Testers-Inspectors perform "similar and allied" work (paragraph 17; Petition, p. 4a) and "identical or practically identical" work (paragraph 20; Petition, p. 4a) which consists of inspecting and testing apparatus, devices, and modules; Testers-Inspectors were divided into two groups, day workers and incentive workers; some Testers-Inspectors were "underpaid." After asserting these differences between Testers-Inspectors, the complaint jumps to the legal conclusion, unsupported by any additional pleadings of fact, that respondents disregarded the interests of some Testers-Inspectors, discriminating against them, and denying them wage increases by means of hostile, arbitrary, invidious and irrelevant discrimination.

Apparently drawing upon the language of such cases as *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 203 (1944), the complaint in this case does charge the Union with "hostility and arbitrary discrimination" (paragraph 27; Petition, p. 6a), and with treating petitioners in "an arbitrary, unfair, invidious and irrelevant man-

ner." (paragraph 28; Petition, p. 6a). These conclusionary allegations, however, are predicated solely on the allegations that two groups of Testers-Inspectors were established, day workers and incentive workers, and the further conclusionary allegation that one group is "underpaid." (paragraph 20 of the complaint; Petition, p. 4a). The fact that one group of employees might earn more money than another group which performs "similar and allied" work or even "identical or practically identical" work (see paragraphs 17 and 20 of the complaint; Petition, p. 4a) does not support an inference of arbitrary, hostile, invidious, irrelevant discrimination.

There are numerous situations, justifiable in an industrial context, in which workers performing the same or similar functions earn different amounts of pay or are paid on different bases. The most obvious of these include the payment of "shift differentials" and the differing earnings of incentive workers. By definition, an incentive worker's pay must in some way be controlled by the quantity and/or quality of his work, and therefore, may fluctuate from one pay period to the next. Obviously then, all incentive workers will not earn pay equal to that of a "day worker" (alleged to be working "without incentive") whose pay rate is fixed and does not fluctuate. Furthermore, the earnings of an employee working on a group incentive basis, for example, will be based not only on his own efforts but on those of the other members of the group. Such an employee might earn more or less than other employees who perform similar or identical work but are in a different group or are not in any group or are not on incentive.

The complaint in this case seeks access to the federal courts upon the mere showing of differences in conditions of employment between employees in a collective bar-

gaining unit. Under petitioners' theory any disgruntled employee could easily use the federal courts as a forum to demand that his employer justify the basis on which he pays thousands of employees and that his union justify the grounds for any and all differences between employees under a collective bargaining agreement; all the employee need do is allege differences between employees and conclude in his pleadings that such differences result from hostile, invidious, irrelevant discrimination. Since nearly all collective bargaining agreements contain such differences, employers and unions may often be called upon in federal court to demonstrate in each particular case the justification for such things as the payment of shift differentials, differences in wage rates for different job classifications, or the establishment of incentive wage systems.

The impact of permitting such suits to be maintained was discussed by District Judge Coolahan in his decision below:

> ". . . one must inquire as to the potential consequences should suits like this be allowed to be maintained. Surely the salutary objective of §301 would not be fostered. Every dissident faction of union members would be able to bring suit in district court by simply alleging unfair representation should they find themselves dissatisfied with the bargain struck by their lawfully elected representatives." Petition, p. 15a.

Judge Coolahan's reasoning is amply supported. In affirming the dismissal of a suit predicated on breach of the duty of fair representation rather than on breach of a collective bargaining agreement, the Court of Appeals for the Eighth Circuit, in *Woody* v. *Sterling Aluminum Prod-*

acts, 365 F. 2d 448, *cert. denied*, 386 U. S. 957 (1967), *rehearing denied*, 386 U. S. 1027 (1967), stated:

> "No precedent has been called to our attention and our research has revealed none that would vest the federal courts with jurisdiction under such circumstances as exist here. *Indeed, to rule jurisdiction might well jeopardize the whole concept of collective bargaining as we know it. We are not prepared to pioneer the allowance of so drastic a step . . .*" 365 F. 2d at 457 (Emphasis added).

The Court's reluctance in *Woody* to unnecessarily tamper with the collective bargaining process was foreseen by Professor Clyde W. Summers:

> "Bargaining is a process of exchange, compromise and surrender of a multitude of claims, and the parties are concerned with finding a formula for settlement. For the courts to weigh too closely the allocation of the benefits among the employees would plunge the courts into a task far beyond their competence and seriously hinder the parties in reaching an agreement." Summers, *Collective Power and Individual Rights in The Collective Agreement—A Comparison of Swedish and American Law*, 72 Yale L. R. 421, 434 (1963).

Most importantly, this Court has also recognized that all those covered by a collective bargaining agreement need not be accorded the same benefits by that agreement.

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. *The mere existence of such differences does not make them invalid. The complete satis-*

> *faction of all who are represented is hardly to be expected." Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 338 (1953) (Emphasis added).

Petitioners have failed to state any fact which would reasonably lead the Court to infer any lack of justification for the establishment of two groups of employees, paid on two different bases. The complaint is utterly devoid of any pleadings of fact which would support petitioners' conclusionary allegations of hostile, invidious discrimination; rather, petitioners seek the right to maintain this action in the federal courts predicating these conclusionary allegations on the "mere existence of . . . differences" among employees.

The impact of such suits on the federal courts will be substantial not only because of the number of suits which will be generated but also because they will require the courts to evaluate the allocation of benefits under an agreement, thus second-guessing the negotiators and hindering unions and employers in negotiating agreements. Such suits would present a threat to the collective bargaining process itself.

The complaint in this case fails to state a claim upon which relief can be granted and fails to present this Court with a federal question worthy of its consideration.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit should be denied.

Dated: November 3, 1972

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